



MINUTES

State-Tribal Relations

Second Meeting
2011 Interim
May 26, 2011

Room 413
State Capitol Building
Pierre, South Dakota

Thursday, May 26, 2011

The second meeting of the Legislature's State-Tribal Relations Committee for 2011 began at 9:05 a.m. (CDT) in Room 413 of the State Capitol Building. **Representative Thomas Brunner** called the meeting to order.

The meeting was held with the following members answering the roll call: Senators Jim Bradford, Ryan Maher, Russell Olson, and Billie Sutton; and Representatives Thomas Brunner, Ed Iron Cloud, Kevin Killer, Patricia Stricherz, and Mike Verchio.

Legislative Research Council staff member present was Tom Magedanz, Principal Research Analyst, and Lisa Shafer, Legislative Secretary.

(NOTE: For purpose of continuity, the following minutes are not necessarily in chronological order. Also, all referenced documents distributed at the meeting are attached to the original minutes on file in the Legislative Research Council (LRC). This meeting was web cast live. The archived web cast is available at the LRC web site at <http://legis.state.sd.us> under "Interim Information – Minutes and Agendas.")

Approval of Minutes

SENATOR BRADFORD MOVED, SECONDED BY REPRESENTATIVE VERCHIO, TO APPROVE THE MARCH 11, 2011 MEETING MINUTES. The motion prevailed unanimously on a voice vote.

Department of Tribal Relations Overview, Goals, and Programs

Mr. Leroy "J.R." LaPlante, Secretary of the Department of Tribal Relations, distributed a PowerPoint presentation about the Department of Tribal Relations (**Document #1**). The Department of Tribal Relations was created in 2011 by an executive order signed by Governor Dennis Daugaard. The state-tribal relationship was greatly influenced by the passage of federal Indian law dating back to the 19th Century – Indian Citizens Act, Indian Reorganization Act, Major Crimes Act, Indian Civil Rights Act, and Indian Child Welfare Act.

The Department of Tribal Relations is guided by the following core values:

- Each tribe operates as a separate government to govern its own citizens under its own laws;
- Each tribe is unique with its own land base, religion, culture, and values;
- Each tribe has a historical and legal relationship with the State of South Dakota;

- The state of South Dakota is to be engaged in a government to government relationship with the tribes; and
- Each tribe is vital to South Dakota – politically, culturally, economically, and historically.

The Department of Tribal Relations established five goals. Listed on pages 3 and 4 of Document #1, the goals include:

- Establish government-to-government relationships (cooperative agreements);
- Establish the Governor's tribal relations policy;
- Memorialize and define the state-tribal relationship;
- Establish the Department of Tribal Relations; and
- Establish trust and promote understanding.

Secretary LaPlante stated that the last major state-tribal relationship study was conducted in 1974. The Department will be conducting a State-Tribal Relations Study that will be funded by the Bush Foundation. The funding will be a three phase grant – planning, implementation, and outcome. The study is expected to take 12 to 18 months to complete. (A copy of the 1974 study was distributed to the committee (**Document #2**)).

The Department of Tribal Relations will also address continuing and emerging issues. Some of the issues are land into trust land, Blood Run State Park, Bear Butte, tax collection agreements, and education. Secretary LaPlante said that the challenges will require honesty, openness, and discussion to find solutions.

Senator Jim Bradford asked the Department to notify legislators in that area when visiting tribal areas.

Representative Patricia Stricherz requested the Department discuss the issue of Indian youth suicide prevention. She stated that suicide among Native American youth is three times the national average.

Senator Billie Sutton asked about other states having a cabinet level secretary for a Department of Tribal Relations in state government. Secretary LaPlante responded that only New Mexico and North Dakota have cabinet level secretaries.

The committee recessed at 10:08 a.m. and reconvened at 10:34 a.m.

Historical Background: Treaties, Land Policy, and Jurisdiction

Mr. Charlie McGuigan, Office of the Attorney General, provided a PowerPoint presentation about the laws specific to tribal land (**Document #3**). There are nine recognized tribes in South Dakota. The term "Indian Country" is defined by Congress under the federal statute 18 USC 1151 sections 1154 and 1156.

Mr. McGuigan informed the committee about various treaties and congressional acts that have affected the relationship between Native American tribes and the state. Some of them include:

- 1851 Ft. Laramie;

- 1858 Yankton (Nakota) – established the current reservation area in Charles Mix county;
- 1867 Sisseton and Wahpeton (Dakota) – the Dakota gave up some rights in North Dakota, South Dakota, and Minnesota;
- 1868 Ft. Laramie (Lakota) – created the great Sioux reservation located in all of western South Dakota;
- 1877 Mannypenny Agreement – opened the Black Hills to settlement;
- 1887 Dawes Act or Allotment act – some tribal land was opened for non-Indian homesteading in hopes to teach Native Americans how to farm; and
- Act of March 1889 – divided Great Sioux Reservation in to six smaller reservations.

The Indian Reorganization Act of 1934 ended the allotment process, returned certain surplus lands to the tribes, created a process for taking land into trust, and allowed for the organization of tribal governments.

Slide 9 of Document #3 is a map of the 1851 Ft. Laramie treaty. The yellow area is the Mannypenny agreement. The orange area is the remaining 1868 great Sioux Reservation that was open to non-Indian homestead. The red areas were never homesteaded. Mr. McGuigan noted that there is non-Indian land in the red areas due to the allotment process.

Mr. McGuigan also discussed civil and criminal jurisdiction issues. He stated that criminal jurisdiction depends on three criteria to determining who has jurisdiction of the crime – offender, victim, and location. The types over crimes include:

- Crimes committed by Indian against an Indian;
- Crimes committed by an Indian against a non-Indian;
- Crimes committed by a non-Indian against an Indian;
- Crimes committed by a non-Indian against a non-Indian;
- Victimless crimes committed by Indians; and
- Victimless crimes committed by non-Indians.

Pages 14 – 19 of Document #3 explains who has jurisdiction for various crimes. It was noted that tribal courts and state courts cannot prosecute non-Indians for crimes on tribal land when the victim is an Indian. These crimes are prosecuted by the federal government. This creates some concern because some misdemeanor offenses are not prosecuted. Those offenses often are not considered as high priority cases compared to more serious crimes.

In response to Representative Brunner's question, Mr. McGuigan stated that the definition of an Indian was established by federal law – a person needs to be an enrolled member of a tribe. However, tribes are able to specify criteria to determine who will qualify as an enrolled member. The qualifications vary among the tribes.

Mr. McGuigan said that civil jurisdiction for the tribes is complicated because there are many grey areas and unanswered questions. The Montana General Rule states that Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land. The jurisdiction is tied to the "Right to Exclude". There are two exceptions to the Montana General Rule:

- A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribes or its members, through commercial dealing, contracts, leases, or other arrangements; and

- A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Recent US Supreme Court decisions have further limited the two Montana General Rule exceptions. The limitations were developed from the Plains Commerce Bank case in 2008. The additional limitations are listed on pages 27 and 28 of Document #3.

Mr. McGuigan noted two barriers to state civil jurisdiction: (1) the exercise of such authority may be preempted by federal law; and (2) it may unlawfully infringe “on the right of reservation Indians to make their own laws and be ruled by them.” The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. When on-reservation conduct involving only Indians is at issue, state law generally does not apply, for the state’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.

For reservation conduct involving non-Indians, “a particularized inquiry into the nature of the state, federal, and tribal interests at stake is necessary, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” Under the Bracker balancing test, the state would usually have jurisdiction over non-Indians.

Mr. McGuigan said that tribes have the most jurisdiction over issues involving family affairs, tribal membership, internal relations, and tribal offices.

Other jurisdiction issues include: Indian Child Welfare Act, Indian Gaming Regulatory Act, and liquor laws (need to be in compliance with Indian and state codes to legally sell liquor).

Office of Indian Education

Mr. Roger Campbell, Director of the South Dakota Office of Indian Education, distributed a handout overviewing Native American education statistics (**Document #4**) and a PowerPoint presentation about the Office of Indian Education (**Document #5**). The priorities and goals of the Office of Indian Education are student achievement, supporting tribal identity, resources, communication and collaboration, and improving education outcomes for Native American students.

South Dakota is currently in the final year of the GEAR UP grant. The Department of Education (DOE) is applying for more grants to continue the GEAR UP college preparatory program. In response to Representative Stricherz’ question, Mr. Campbell stated that GEAR UP has a success rate of around 91%.

Mr. Campbell stated, in response to Senator Bradford’s question, that there is a request for the state to help support nontribal members who attend tribal universities because the federal government is not funding those students.

Senator Maher inquired about the curriculum for the public schools. Mr. Campbell said that he will provide the information to the committee.

The committee recessed at 12:04 p.m. for lunch and reconvened at 1:00 p.m.

Department of Revenue – Tax Collection Agreements

Mr. David Wiest, Deputy Secretary, South Dakota Department of Revenue, discussed tax collection agreements between the state and the tribes. In 1974 the Legislature adopted SDCL Chapter 10-12A authorizing the state to enter into agreements with the tribes to jointly collect taxes on each others' behalf and distribute the revenues based on population percentages and other factors agreed upon in the tax collection agreements. The first such agreement was with the Oglala Sioux Tribe in 1975 for collection of the cigarette tax, and several tribes have agreements in place with the state. For example, the Cheyenne River Sioux Tribe has agreements for collection of sales, use, contractors excise, fuel, and tobacco taxes. The percentage split of the revenues that go to the state and the tribes varies for each tribe as the agreements are negotiated with individual tribes. For example, the split for taxes collected on the Standing Rock Reservation is 37% to the state and 63% to the tribe, while the Oglala Sioux Tribe receives 96% and the state 4% of applicable taxes collected on the Pine Ridge Reservation. The difference is based on the estimated Native and non-Native populations in each area. **Mr. Eric Antoine**, attorney and lobbyist for the Rosebud Sioux Tribe, asked about the possible collection of wind energy taxes by the state on trust land, which could constitute double taxation by the state and the tribe on investors. These taxes are not included in the tax collection agreements. Rep Brunner asked whether towns located on reservations can collect additional municipal sales taxes. Mr. Wiest answered that the state is not involved in the collection of these taxes on reservations, but he believes that some reservation towns do collect the additional sales tax. Mr. Wiest also noted that wind energy taxation is a new area to be dealt with as it affects the tribes, but the existing tax collection agreements have been very helpful to both the state and the tribes.

Department of Social Services Programs and Activities Affecting the Native American Population

Ms. Kim Malsam-Rysdon, Secretary, Department of Social Services, distributed a handout entitled "South Dakota Department of Social Services – State-Tribal Relations Committee Meeting" (**Document #6**) and briefed the committee on the organization of the department and on programs and activities affecting the Native American population. The department consists of the office of the secretary and the divisions of Adult Services and Aging, Child Care Services, Child Protection Services, Child Support, Economic Assistance, Medical Services, Community Behavioral Health, and Correctional Behavioral Health and the Human Services Center.

With respect to Native American tribes, the tribes have the option of running their own programs in the following areas: child welfare programs (two tribes contract with the state to operate their own programs), nutrition (four tribes operate their own), low income energy assistance (seven tribes operate their own), child care assistance (nine tribes operate their own), child support enforcement (one tribe operates its own), drug and alcohol treatment (nine

tribes operate their own and three are state-certified). The state also contracts with two tribes to administer their own child welfare agencies: Sisseton-Wahpeton Oyate since 1978 and the Oglala Sioux Tribe since 2008. Other initiatives related to Native American populations and the tribes include suicide prevention efforts, Medicaid/CHIP enrollment, emergency room diversion grants, and Medicaid tribal consultation. Ms. Malsam-Rysdon also discussed changes and impacts of the federal health care reform act. Representative Stricherz asked about the Indian Child Welfare Act, ICWA, and how it applies. **Ms. Regina Wiesler**, Department of Social Services, described the basic functioning of ICWA and stated that there has been a recent study of ICWA in South Dakota with suggestions for improvement relating to placement of children with relatives and the use of expert witnesses for nontribal placement. **Representative Mike Verchio** asked about programs of the Indian Health Service (IHS) and discussed who is responsible for its program outcomes. He also inquired about various controls and measures of efficiency for the Medicaid program. Representative Brunner noted that there has been much abuse of emergency room facilities and asked about emergency room diversion programs. Ms. Malsam-Rysdon replied that they attempt to use a combination of strategies; there is a need for disincentives for seeking inappropriate services and there is a need for access to appropriate care and education on appropriate services, as well as proper use of preventative services.

Public Testimony

Mr. Webster Two Hawk, Sr., Rosebud Sioux Tribal Council, and Marge Two Hawk congratulated Secretary LaPlante on his appointment to head the new Department of Tribal Relations. They also discussed children's issues and issues related to ICWA, including the notification process, potential identity theft problems, and the use of false tribal enrollment documents in order to adopt a child.

Mr. Mato Standing High, Attorney General, Rosebud Sioux Tribe, stated that he appreciates the committee's efforts and congratulated Secretary LaPlante on his appointment and the creation of the Department of Tribal Relations. He discussed numerous issues and opportunities for cooperation and mutual benefit, such as Bear Butte, economic development and tourism, wind power and wind power taxation, social services needs, and others. **Senator Ryan Maher** commented that he would like to see more activity in the area of tourism.

Ms. Brenda Bellonger, Tribal Attorney, Sisseton-Wahpeton Oyate, informed the committee about an issue related to forms required by the Division of Motor Vehicles to enable tribal members to apply for the motor vehicle excise exemption tax. She provided the committee a packet of documents on the issue (**Document #7**). She stated that the original form requested a large amount of personal information that is not necessary for determining the applicant's eligibility. The form has been revised, but still requests information that could be considered invasive. The Sisseton-Wahpeton Oyate has brought the matter before the U.S. Civil Rights Commission. The Tribe has devised a revised form to be verified and signed by the tribal realty officer rather than the county treasurer, as the current form requires, but this has not been reviewed by the state. **Senator Craig Tieszen** asked whether other tribes have similar issues. Ms. Bellonger stated that some probably do but she could not say for sure. Senator Tieszen suggested that a meeting be set up to address this issue and that the tribe work with the Department of Tribal Relations on the issue.

Committee Discussion

The committee will hold its next meeting in late August or early September on one of the reservations in South Dakota if possible.

Adjournment

SENATOR TIESZEN MOVED, SECONDED BY REPRESENTATIVE VERCHIO, THAT THE MEETING BE ADJOURNED. The motion prevailed on a voice vote.

The meeting was adjourned at 4:45 p.m.



All Legislative Research Council committee minutes and agendas are available at the South Dakota Legislature's Homepage: <http://legis.state.sd.us>. Subscribe to receive electronic notification of meeting schedules and the availability of agendas and minutes at **MyLRC** (<http://legis.state.sd.us/mylrc/index.aspx>).